

SOON KIM SENG v. PUBLIC PROSECUTOR

[A.Cr.J. (Chang Min Tat J.) October 15, 1975]

[Kuala Lumpur — Selangor Criminal Appeal No. 186 of 1974]

Copyright — Infringement of — Possession of contrivances for purposes of infringing copyrights of complainant — Appeal against conviction and sentence — Whether legislation had provided penalty for possession of contrivances for making infringing copies of copyright materials — Copyright Act, 1969, ss. 2 & 15(1).

Copyright — "contrivance" and "infringing copy" distinguished — Failure of Parliament to provide punishment for offence of possession of contrivances for making infringing copies of copyright materials — Copyright Act, 1969, s. 15(1).

The appellant was convicted on 3 charges of having in his possession contrivances capable of being used for the purposes of making infringing copies of textbooks the copyrights of which were vested in the complainant. He appealed against conviction and sentence. The appeal was on the grounds that the fines of \$1,500 on each of the 3 charges were excessive and that the legislation had not provided for any fine or punishment for the possession of a duplicating contrivance.

Held, allowing only the appeal on sentence: (1) there is in the Copyright Act read as a whole a clear distinction between an infringing copy and a contrivance;

(2) Parliament had failed to provide a punishment for the offence of possession of contrivances for the making of infringing copies of copyright materials.

CRIMINAL APPEAL.

Sidney Augustin for the appellant.

T.S. Sambanthamurthi (Deputy Public Prosecutor) for the respondent.

Chang Min Tat J.: Everything that could possibly be said in this appeal from the conviction of the appellant on three charges of having in his possession contrivances capable of being used for the purposes of making infringing copies of textbooks the copyrights of which were clearly vested in the complainant was said by learned counsel for the appellant in a long and forceful submission. I have however the misfortune of remaining unpersuaded, and I therefore uphold the conviction.

There was also an appeal against sentence. The appeal was not only on the ground that the fines of \$1,500 on each of the three charges were excessive. It was also based on the submission that the legislation had not provided for any fine or punishment for the possession of a duplicating contrivance. Startling though this submission might be it was when one's attention was drawn to the wording of the penal section, not so unjustified. The section creating the offences and laying the penalties was section 15, as unamended, since the offences were committed before August 1975.

"15. (1) Any person who at a time when copyright subsists by virtue of this Act in a work —

- (a) makes for sale or hire any infringing copy; or
- (b) sells, lets for hire or by way of trade exposes or offers for sale or hire any such infringing copy; or
- (c) distributes any such infringing copies; or
- (d) by way of trade exhibits in public any such infringing copy; or
- (e) imports into Malaysia, otherwise than for his private and domestic use, any such infringing copy; or
- (f) makes or has in his possession any contrivance capable

of being used for the purposes of making infringing copies,

shall unless he proved that he acted in good faith and had no reasonable grounds for supposing that copyright would or might be thereby infringed, be guilty of an offence and on conviction shall be liable to a fine not exceeding two hundred dollars for each infringing copy in respect of which the offence was committed (subject to a maximum of fifty thousand dollars in respect of any one offence) or to imprisonment for a term not exceeding one year, or to both."

With effect from May 30, 1975 the section was amended to provide for a further offence and for certain changes in the law. The amendment is however of no consequential effect on this appeal or in the interpretation thereof with regard to the penalties prescribed for the possession of contrivance.

Having regard to the wording of the section which has been set out *in extenso* to facilitate such a reference, it is in the first place obvious that there is in this sub-section, a distinction between an infringing copy and a contrivance. Secondly the penal words "not exceeding two hundred dollars for each infringing copy in respect of which the offence was committed (subject to a maximum of fifty thousand dollars in respect of any one offence)" must in the context qualify the word "fine". If this construction is correct, it also follows that the alternative sentence of a term of imprisonment and the provision of both a fine and imprisonment must refer to the offence of possession of infringing copies.

The learned Deputy Public Prosecutor who was given time to reply and who handed up a written submission contended otherwise. He thought that the punishment for the offence of possession of a contrivance was a fine with no limits prescribed or a term of imprisonment or both. It is doubtless within the competency of Parliament to so legislate but his contention requires the section to be read to mean that a person "shall on conviction be liable to a fine or to imprisonment for a term not exceeding one year or both, provided that in the case of infringing copies the fine shall not exceed two hundred dollars, subject to a maximum of fifty thousand dollars in respect of any one offence." The language is sufficiently disparage to show that such a construction must violate the cardinal principle of giving the words of a statute, in particular a penal statute, their plain and obvious meaning.

The alternative submission of the Deputy Public Prosecutor was that if the fine was applicable only in respect of infringing copies, then the punishment for possession of a contrivance was a term of imprisonment without the alternative of a fine. This with respect cannot be correct. The violence to the language such an interpretation does must be a clear and sufficient answer, even if it is not noticed that the term is an alternative to the fine.

The construction suggested by learned counsel for the appellant is to the effect that a contrivance is not a copy or an infringing copy and that section 15 by a curious hiatus fails to provide for a penalty for the offence of being in possession of a contrivance.

Now, section 2 which is the interpretation section, does not define contrivance. It also does not include

contrivance within the definition of "copy" since copy is defined to mean "a reproduction of a work in written form, in the form of a recording or cinematograph film or in any other material form." The penal section 15 does not speak of copy; it refers to infringing copy.

Even section 15(5) which reads:

"(5) For the purpose of this section, an 'infringing copy' means an article which if made in Malaysia constitutes an infringement of copyright under this Act, and if made outside Malaysia would constitute an infringement of copyright under this Act if the making thereof had taken place in Malaysia."

on a proper and reasonable construction, must mean that there is in this sub-section no extension of "infringing copy" to include a contrivance.

There is therefore in the Act read as a whole a clear distinction between an infringing copy and a contrivance.

The problem thus is squarely the construction of section 15(1) and, though not without regrets, I cannot on a proper and reasonable construction avoid the conclusion that in all probability, and perhaps unwittingly, Parliament had failed to provide a punishment for the offence of possession of contrivances for the making of infringing copies of copyright materials.

The appeal from the sentences must succeed. The fines if paid are to be refunded. The conviction stands.

Order accordingly.

Solicitors: *Augustin-Negrin & Co.*

SELVARAJAH & ANOR. v. OFFICIAL ADMINISTRATOR & ANOR.

[O.C.J. (Abdul Hamid J.) June 28, 1977]

[Kuala Lumpur — Civil Suit No. 2029 of 1976]

Practice & Procedure — Official Administrator — Whether he could be sued — Probate and Administration Ordinance, 1959, s. 39 — R.S.C. 1957, O. 16 r. 48.

The Official Administrator sued as representative of the Estate of one M. (deceased), as the first defendant, asked that the writ against him be set aside on the ground that he had no capacity to be sued.

Held, allowing the application: mere vesting of the property in the Official Administrator does not place him in such a capacity that he can be sued.

Cases referred to:-

- (1) *Comptroller of Income Tax v. Tan Tai Min* [1965] 1 M.L.J. 255.
- (2) *K.A.L.R.M. Karuppan Chettiar v. Subramaniam Chettiar The Official Administrator, F.M.S. Palaniappa Chettiar Muthukaruppan Chettiar* [1933] M.L.J. 226.

CIVIL SUIT.

Sri Ram for the first defendant.

Paramjit Singh Gill for the plaintiffs.

Abdul Hamid J.: The Official Administrator sued as representative of the Estate of Mohamed Khair Bakri bin Mokhtar (deceased), as the first defendant, is asking that the amended writ dated September 6, 1976, amended on December 4, 1976 be set aside as against him on the ground that he has no capacity to be sued.

A An affidavit in support of the application affirmed by one Chang Weng Wai, an assistant claims manager of Safety Life and General Insurance Sendirian Berhad, claims that at the time the writ was issued there was no administrator or other personal representative in respect of the Estate of the deceased.

B The order appointing the Official Administrator as representative of the Estate of the deceased was made on November 22, 1976 and a further order to amend the writ was also made.

C Encik Paramjit Singh Gill solicitor for the plaintiffs/respondents in reply states that a specially indorsed writ was filed on September 6, 1976. This was followed by an application by way of summons-in-chambers on September 13, 1976 asking for the appointment of the Official Administrator to represent the estate of the deceased in accordance with Order 16 rule 48 of the Rules of Supreme Court.

D It is the respondents' contention that by virtue of section 39 of the Probate and Administration Ordinance, 1959 the movable and immovable property of the person who dies intestate until administration is granted vests in the Official Administrator and the suit commenced against the Official Administrator is properly commenced even though the administration of the estate has not been granted to substitute the Official Administrator with the administrator.

E The respondents also maintain that the court order made on November 22, 1976 was properly made as the summons was filed within time and not barred by limitation.

F In support of the application Encik Sri Ram cited the case of *Comptroller of Income Tax v. Tan Tai Min*⁽¹⁾ where it was held that the defendant was not the administrator, even though he had obtained an order for grant of letters of administration but had not extracted it, and action could not be brought against him as administrator. The defendant's application to strike out the writ of summons was allowed.

G Turning to section 39 of the Probate and Administration Ordinance, 1959, relied upon by the respondents, Encik Sri Ram cited the case of *K.A.L.R.M. Karuppan Chettiar v. Subramaniam Chettiar The Official Administrator, F.M.S. Palaniappa Chettiar Muthukaruppan Chettiar*⁽²⁾ to show that the Official Administrator is merely placed in the position of a receiver of the intestate's estate pending the grant of letters of administration and he cannot be sued by virtue of this section alone.

H Encik Sri Ram then pointed out that section 30 of the Probate and Administration Enactment 1930 (Cap. 8) is substantially similar to section 30 of the Probate and Administration Ordinance, 1959.

I In consideration I find merit in this application. It would seem clear that mere vesting of the property in the Official Administrator does not place him in such a capacity that he can be sued and for this reason I allow the application and order that the writ against the first defendant be set aside with costs.

Application allowed.

Solicitors: *Sri Ram, Chan & Chia; Gill & Tang.*